RESPONSE REQUESTED

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SUPREME COURT, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ERIC MICHAEL CLARK,

PETITIONER,

VS.

STATE OF ARIZONA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Assuming *arguendo* that the Due Process Clause requires the individual states to provide criminal defendants with an insanity defense, does it also require them to adopt the *M'Naghten* rule *in toto*?

2. Although the trial court expressed a preliminary opinion that evidence of a mental disease or defect was not admissible to negate Petitioner's *mens rea*, it allowed Petitioner to introduce evidence on this issue and make an offer of proof as to its admissibility. Despite the trial court's invitation, however, Petitioner did not make an offer of proof. Did Petitioner properly present his claim that he was barred from using evidence of a mental disease to negate his *mens rea*?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

CONCLUSION 17

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

APPENDIX G

APPENDIX H

APPENDIX I

TABLE OF AUTHORITIES

CASES — PAGE

Adams v. Robertson, 520 U.S. 83 (1997) 9, 12
Ake v. Oklahoma, 470 U.S. 68 (1985) 4
Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory, 325 U.S. 450 (1945) 13
Allen v. Hardy, 478 U.S. 255 (1986) 10
Cardinale v. Louisiana, 394 U.S. 437 (1969) 15
Coleman v. Thompson, 501 U.S. 722 (1991) 8
Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) 5
Dretke v. Haley, 541 U.S. 386 (2004) 8
Durley v. Mayo, 351 U.S. 277 (1956) 8
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 10
Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230 (1988) 10
Finger v. State, 117 Nev. 548, 27 P.3d 66 (Nev. 2001) 6
Foucha v. Louisiana, 504 U.S. 71 (1992) 4
Glover v. United States, 531 U.S. 198 (2001) 6
Illinois v. Gates, 462 U.S. 213 (1983) 14, 15
Lambrix v. Singletary, 520 U.S. 518 (1997) 8
Leland v. Oregon, 343 U.S. 790 (1952) 6
Medina v. California, 505 U.S. 437 (1992) 4
Montana v. Egelhoff, 518 U.S. 37 (1996) 11
Morgan v. Krenke, 232 F.3d 562 (7th Cir. 2000) 14
Morissette v. United States, 342 U.S. 246 (1952) 12
Patterson v. New York, 432 U.S. 197 (1977) 4, 11
Picard v. Connor, 404 U.S. 270 (1971) 14
Powell v. Texas, 392 U.S. 514 (1968) 4, 5
Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) 16
South Dakota v. Neville, 459 U.S. 553 (1983) 8
State v. Bethel, 275 Kan. 456, 66 P.3d 840 (Kan. 2003) 6, 12
State v. Fendler, 127 Ariz. 464, 622 P.2d 23 (App. 1980) 8
State v. Gulbrandson, 184 Ariz. 46, 906 P.2d 579 (1995) 8
State v. Korell, 213 Mont. 316, 690 P.2d 992 (Mont. 1984) 12
State v. McKeon, 201 Ariz. 571, 38 P.3d 1236 (App. 2002) 16
State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) 2, 7, 9, 11-13, 15, 16
State v. Walton, 159 Ariz. 571, 769 P.2d 1017 (1989) 8
United States v. Fischer, 328 U.S. 463 (1946) 11
Wainwright v. Sykes, 433 U.S. 72 (1977) 8
Webb v. Webb, 451 U.S. 493 (1981) 12
Wong v. Money, 142 F.3d 313 (6th Cir. 1998) 13

STATUTES

A.R.S. § 13-502 ..... 1, 2
A.R.S. § 13-502(A) 6
A.R.S. § 13-1105(A)(3) 7
28 U.S.C. § 1297(a) 16

RULES

Rule 20, Ariz. R. Crim. P 1

OTHER AUTHORITIES

WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 36 (1972) 5

STATEMENT OF THE CASE

Petitioner was charged with first-degree murder for knowingly or intentionally killing a police officer acting in the line of duty. (Record on Appeal ["R.O.A."], Item 3.) Petitioner waived his right to a jury trial. (R.O.A., Item 324.) A bifurcated bench trial was held, with the guilt phase preceding the insanity phase. After the prosecution presented its evidence in the guilt phase, Petitioner moved for a directed verdict pursuant to Arizona Rule of Criminal Procedure 20. (R.T. 8/8/03, at 76–78.) Petitioner argued that there was insufficient evidence that he knew he was killing a police officer, and, thus, contended that the charge should be reduced to a lesser homicide. (*Id.*) The prosecutor, in response, pointed out that the victim was a fully uniformed police officer who was shot after he used his marked police cruiser to pull over Petitioner. (*Id.*) In reply, Petitioner stated that, after the completion of the defense case, he would be reasserting his argument that he did not have the requisite intent due to "his state of mind." (*Id.*)

Petitioner did not present any evidence in the guilt phase. (R.O.A., Item 373.) After the trial court denied Petitioner's motion for a directed verdict, Petitioner gave an opening argument relating to the insanity phase, stating: "[A]t the end of this case your [honor's] verdict is going to rest on whether [Petitioner] knew what he was doing was wrong." (Respondent's Appendix ["Resp. App."] A, at 4.) Petitioner did not argue that any of the evidence introduced at the insanity phase would affect his ability to form the *mens rea* to commit an intentional killing or to recognize that his victim was a police officer. (*Id.* at 4–24.)

Later in the day, the trial court requested the parties to prepare memoranda of law on some legal issues that had been raised during an unrecorded chambers conference. (*Id.* at 73–74; R.O.A., Item 373.) In his memorandum, Petitioner argued, *inter alia* that, under A.R.S. § 13-502, Arizona's

insanity statute, evidence of a mental disorder is relevant to negate the *mens rea* of a crime. (Resp. App. B.) Petitioner further argued that A.R.S. § 13–502 is unconstitutional because it: (1) does not allow him to argue that he was unable to appreciate the nature and quality of his actions; (2) requires him to carry the burden of proof by clear and convincing evidence; and (3) "shifts the burden of proof to [Petitioner] on the specific intent element of this crime." (*Id.*)

Addressing Petitioner's contention that evidence of a mental defect could be relevant to negate *mens rea*, the trial court expressed a preliminary opinion that an Arizona Supreme Court opinion barred such evidence.[1] (Resp. App. C, at 5–6.) The trial court, however, stated that it would not preclude Petitioner from introducing any evidence on this issue. (*Id.*) Rather, the court specifically stated that it would allow Petitioner "get all that stuff in" and allow him to "make an offer of proof" to preserve this issue. (*Id.*; see also R.O.A., Item 377.)

During the insanity phase, there was no testimony that Petitioner's mental state rendered him incapable of forming the intent to knowingly kill a police officer at the time of the offense. (App. D, at 12–121 [testimony of Petitioner's expert witness].) After the evidence in the insanity phase was concluded, Petitioner reasserted his motion for a directed verdict. (App. E, at 4.) Petitioner did not argue that a mental defect prevented him from forming the intent to knowingly kill a police officer. (*Id.*) During his closing argument on the issue of insanity, Petitioner again failed to make any argument, or cite any evidence, that would have rendered him incapable of forming the necessary intent for the crime of first-degree murder. (*Id.* at 4–29, 59–70.)

In a special verdict, the trial court first found that the prosecution had proven Petitioner's guilt beyond a reasonable doubt. (App. F, at 1–2.) The court then found that Petitioner had not met

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1 *State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997) (holding that expert testimony that defendant suffered from battered women's syndrome was inadmissible to show that she was incapable of forming the intent to commit child abuse).

his burden of establishing that he was insane at the time of the crime. (*Id.*, at 2–5.) In making this finding, the trial court noted that it had considered, among other things, the fact that Petitioner "was aware that Officer Moritz was a police officer." (*Id.*)

After Petitioner was sentenced, he filed a motion to vacate the judgment and sentence. (Resp. App. G.) As relevant to this instant petition, Petitioner argued that: (1) the Arizona insanity statute violates due process because it eliminates that "the nature and quality of the act" prong from the *M'Naghten* insanity test; and (2) the trial court's refusal to consider whether Petitioner's mental illness prevented him from forming the necessary intent for first-degree murder violated due process. (*Id.*) Again, Petitioner failed to make any argument, or cite any evidence, demonstrating that he had a mental defect or disease that would have prevented him from knowingly killing a police officer. (*Id.*) The trial court denied the motion finding that the motion was not "supported by the law as it exists in the State of Arizona at this time." (R.O.A., Item 424.)

The Arizona Court of Appeals affirmed Petitioner's convictions and sentence. (Petitioner's Appendix ["Pet. App."] A.) As relevant to this petition, the court found that Arizona's insanity statute did not violate due process because the individual states are "free to recognize and define the insanity defense as they see fit." (*Id.* at 15–16, ¶¶ 37–38.) Concerning the second issue in the petition, the court found that – contrary to Petitioner's contentions – the trial court did not stop Petitioner from presenting evidence that a mental disease or defect prevented him from forming the *mens rea* to commit first-degree murder. (*Id.* at 18–20, ¶¶ 43–45.) Also, the court stated that although the trial court permitted Petitioner to make an offer of proof at the end of the case, Petitioner specified no evidence "that demonstrated he was not capable of knowing he was killing a police officer." (*Id.*) Alternatively, the court found that evidence of a mental disorder to negate the

mens rea of an offense was not admissible in Arizona based on a prior decision of the Arizona Supreme Court. (*Id.*)

REASONS FOR DENYING THE WRIT

A. This Court's Precedents Leave No Doubt That The Individual States Are Not Required to Apply One, and Only One, Insanity Standard in Criminal Cases.

The Due Process Clause has very limited application in criminal law outside the specific guarantees of the Bill of Rights. *Medina v. California*, 505 U.S. 437, 443 (1992) (noting that the unrestrained use of the clause to review state criminal convictions would "invite undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order"). The States are given particularly wide latitude in defining the elements of offenses and defenses thereto. *See Patterson v. New York*, 432 U.S. 197, 201 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.") (internal citation omitted); *Powell v. Texas*, 392 U.S. 514, 536 (1968) (noting that defining "*actus reus*, *mens rea*, insanity, mistake, justification, and duress [has] . . . always been thought to be the province of the States"). Given this deference to the states in this area, this Court has never held that an insanity defense is a fundamental right. *Medina v. California*, 505 U.S. 437, 449 (1992) ("[W]e have not said that the Constitution requires the States to recognize the insanity defense."); *see also Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring) (noting that the states are free to "determine whether, and to what extent, mental illness should excuse criminal behavior"); *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting) ("It is highly doubtful that due process requires a State

to make available an insanity defense to a criminal defendant."); *Despears v. Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995) (noting that states are "not constitutionally obligated to recognize a defense of insanity" and further noting that "several states have abolished the defense"). Accordingly, because the States are not required to provide criminal defendants *any* insanity defense, Petitioner's claim that he is entitled to a *particular* insanity defense necessarily fails at the outset.

Further, assuming *arguendo* that the Federal Constitution does require the individual states to provide an insanity defense, there is certainly no right to a particular insanity test. Rather, defining insanity is a task for the States:

> The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has *always* been thought to be the province of the States.

Powell v. Texas, 392 U.S. 514, 535–536 (1968) (emphasis added). Indeed, a constitutional rule for insanity would all but eliminate experimentation among the states in this area and "freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Id.*, 392 U.S. at 536–37. Thus, "[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* at 536. Therefore, even if the states are required to provide an insanity defense to criminal defendants, this Court's prior decisions make clear that no one particular test is required.

Moreover, the *M'Naghten* test has often been referred to as the "right or wrong" test. *See e.g.*, *Powell*, 392 U.S. at 536 (referring to *M'Naghten* as the "the right-wrong test"); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 36, at 277 (1972) ("[I]n many jurisdictions the *M'Naghten* rule is stated merely in terms of the defendant's ability to distinguish right from wrong, and there is no mention of or instruction on knowledge of the nature and quality of the act."). Thus,

assuming *arguendo* due process requires the individual states to adopt the essence of the *M'Naghten* test—that a defendant know his actions are wrong—this Court should still not accept review of this case because Arizona's insanity statute incorporates this standard. A.R.S. § 13–502(A). *See Leland v. Oregon*, 343 U.S. 790, 800-01 (1952) (rejecting claim that Oregon's "right and wrong" test violated due process, noting that "[k]nowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions").

Finally, Petitioner contends that this issue impacts a number of states that have recently abolished the insanity defense. (Petition at 14.) Each of these states, however, utilizes a "*mens rea* approach" to insanity, which allows the defendant to introduce evidence of a mental disease or defect to negate the intent element of the crime. *See, e.g., State v. Bethel*, 275 Kan. 456, 66 P.3d 840 (Kan. 2003) (collecting cases and literature on the *mens rea* approach). Arizona does not utilize a *mens rea* approach to insanity. Accepting this case, therefore, would not resolve the issues relating to that approach. *See Glover v. United States*, 531 U.S. 198, 203 (2001) ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari."). Also, only one state court of last resort has found—over a vigorous dissent—that the constitution requires both prongs of *M'Naghten*. *Finger v. State*, 117 Nev. 548, 578, 27 P.3d 66, 86 (Nev. 2001). This decision was based in part on the state constitution. *See id.* at 551, 27 P.3d at 68 (finding that the state statute violated "the due process clauses of the United States and Nevada Constitutions"). Petitioner, therefore, has failed to demonstrate any significant jurisdictional conflict on this issue.

Thus, for all of the above reasons, Petitioner's first issue fails to present this Court with a substantial federal question.

B. Petitioner's Second Issue Was Rejected On Independent and Adequate State Grounds.

Petitioner contends that the trial court refused to consider evidence, that because of a mental

disease or defect, he was only guilty of a lesser homicide because he did not knowingly kill a police officer.[2] (Petition at 3.) The record of transcript Petitioner cites for this "refusal," however, demonstrates that the trial court did not prevent Petitioner from introducing *any* evidence on this issue. (Resp. App. C, at 5–6.) Rather, although the court expressed a preliminary opinion that such evidence was not relevant to Petitioner's *mens rea*, it allowed Petitioner to introduce evidence on this issue, encouraging him to make an offer of proof at the end of the trial:

> I'm going to let you go ahead and get all that stuff in because it goes to the insanity issue [as well] and because we're not in front of a jury. At the end, I'll let you make an offer of proof as to the intent, the *Mott*[3] issues, but I still think the supreme court decision [in *Mott*] is the law of the land in this state.

(*Id.* at 5.) The court added, "I will certainly allow you to preserve the issue; you can argue or not argue, but you can make an offer of proof at the conclusion of the case . . . ." (*Id.* at 6.) Petitioner, however, never made an offer of proof that he had a mental defect or disease that prevented him from knowingly killing a police officer. (Resp. App. E, at 4–29, 59–70.) Rather, Petitioner only argued that he was legally insane under Arizona law. (*Id.*)

Rejecting Petitioner's claim, the Arizona Court of Appeals found that the trial court did not prevent Petitioner from introducing evidence of a mental disease or defect that would negate his *mens rea*. (Pet. App. A, at 14, ¶ 31; 18, ¶ 43.) The court also found that Petitioner specified "no evidence in his offer of proof that demonstrated that he was not capable of knowing he was killing a police officer." (*Id.* at 19, ¶ 44.) Although the court of appeals used the term "offer of proof," the

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2 *See* A.R.S. § 13-1105(A)(3) ("A person commits first degree murder if . . . [i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.").

3 *State v. Mott*, 187 Ariz. 536, 540–45, 931 P.2d 1046, 1050–55 (1997) (holding that expert testimony regarding battered-woman syndrome was not admissible to show that defendant's mental capacity negated specific intent to commit child abuse).

court was necessarily referring to Petitioner's closing argument for the insanity phase of the trial—there was no separate "offer of proof." (See Resp. App. E, at 4–29, 59–70; see also App. I, at 20 [Petitioner's state-court reply brief conceding there was no offer of proof].) Thus, the reasoning of the court of appeals leaves no doubt that the primary basis for rejecting Petitioner's claim was waiver.[4] *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (noting that a state's court decision need not use any "particular language" in order to be based on independent and adequate grounds). This was an independent and adequate state ground for rejecting Petitioner's claim. *See Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977) (finding of waiver "amounted to an independent and adequate state procedural ground").

"[A]n adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment . . . ." *Dretke v. Haley*, 541 U.S. 386, 392 (2004). Indeed, when a state law determination is sufficient to sustain a judgment, "any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). Further, because the burden is on the petitioner to establish jurisdiction, this Court has "regularly dismissed cases when the state judgment *might* have rested on an independent and adequate state ground." *South Dakota v. Neville*, 459 U.S. 553, 569 n.4 (1983) (original emphasis); *see also Durley v. Mayo*, 351 U.S. 277, 284–85 (1956) (finding that independent and adequate state grounds existed where order denying review was arguably inconclusive).

[4] *See State v. Gulbrandson*, 184 Ariz. 46, 59, 906 P.2d 579, 592 (1995) ("Defendant did not properly preserve this issue for appeal because his counsel failed to make an offer of proof" concerning the defense expert's testimony of the defendant's mental state of mind at the time of the offense.); *State v. Walton*, 159 Ariz. 571, 581–82, 769 P.2d 1017, 1027–28 (1989) (evidence concerning a witness's psychiatric history need not be admitted if "the defendant fails to make an offer of proof that the witness' perception or memory was affected by [a mental] illness"); *State v. Fendler*, 127 Ariz. 464, 477, 622 P.2d 23, 36 (App. 1980) (defendant's claim that he was precluded from introducing relevant evidence as to his intent "fail[ed] for lack of an adequate offer of proof").

Accordingly, because the court of appeals rejected Petitioner's claim on an independent and adequate state ground, this Court is without certiorari jurisdiction to review this issue.

C. Petitioner's Second Issue Was Not Addressed By The Arizona Court of Appeals or Properly Presented to the State Courts.

1. *The court of appeals did not address the federal issue sought to be presented here.*

This Court will not consider a federal challenge to a state decision "unless the federal claim was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson,* 520 U.S. 83, 86 (1997) (per curiam). The court of appeals' alternate basis for rejecting Petitioner's claim was that the evidence was barred by *Mott*, a state court opinion. (Pet. App. A. at 19, ¶¶ 44–45.) The court did not cite *any* federal law in rejecting the claim. (*Id.*) Further, while *Mott* rejected a due process claim, the decision is based principally on its interpretation of the Arizona criminal code, an issue of state law. *Mott*, 187 Ariz. at 540–45, 931 P.2d at 1050–55 ("Because *the legislature* has not provided for a diminished capacity defense, we have since consistently refused to allow psychiatric testimony to negate specific intent.") (emphasis added). The court of appeals reference to *Mott*, therefore, did not indicate that the court was deciding any federal issues. Nor is there any other indication in the court's memorandum decision indicating that it was deciding a federal issue when it rejected Petitioner's claim. (Pet. App. A at 18–20, ¶¶ 43–45.) In short, the Arizona Court of Appeals did not address the federal claim that Petitioner asks this Court to review.

2. *Petitioner has not met his burden of demonstrating that his federal claim was properly presented in the trial court and in the court of appeals.*

Because the court of appeals decision is silent on the federal question, it is presumed that the issue was not properly presented. *Adams*, 520 U.S. at 86. Petitioner bears the burden of defeating this presumption by affirmatively establishing that the state court had a fair opportunity to address

the federal question sought to be raised. *Id.*; *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Petitioner has not met this burden.

Petitioner filed a memorandum of law arguing that Arizona's insanity statute allowed him to introduce evidence of a mental disorder to "negate the *mens rea* element of a crime," *i.e.*, the specific intent the "killing [was] of a police officer." (App. B, at 2.) Petitioner's argument, however, was not premised on federal law—it was based solely on his reading of the state statute. (*Id.*) In addition to failing to provide a legal basis for a federal claim, Petitioner also failed to present a factual basis for his claim. In the guilt phase of the trial, Petitioner did not present any evidence—or request to present any evidence—that he had a mental defect or disease that would affect his ability to recognize his victim as a police officer in the guilt phase of the trial. (See, e.g., R.O.A., Item 373 [minute entry noting that, after the prosecution rested, the case proceeded directly to "Phase II"].) More importantly, despite the trial court's invitation to Petitioner to preserve the issue by making an offer of proof on this issue, Petitioner failed to do so. (Resp. App. C, at 5–6; Resp. App. E, 4–29, 59–70.) In sum, Petitioner failed to provide the trial court with a legal *or* a factual basis for a federal claim before the trial court rendered its verdict. *See, e.g., Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 247 (1988) (rejecting claim suspended bank officer was prevented from presenting evidence where "no offer of proof was ever made, and thus certainly was not rejected"); *Allen v. Hardy*, 478 U.S. 255, 257 (1986) ("Petitioner's failure at trial to make even an offer of proof [concerning the alleged improper use of peremptory challenges] constituted a procedural default for which petitioner had offered no excuse.").

In a motion to vacate the judgment and sentence, Petitioner alleged that the trial court's "failure to consider whether as a result of [his] mental illness he was unable to form the *mens rea* necessary to commit an intentional or knowing murder deprived him of his fundamental right to

contest the state's case, the right to present a complete defense and the right to a fair trial in violation [of] his rights to due process under the Fourteenth Amendment, U.S. Constitution . . . ." (Resp. App. G, at 1–2.) Petitioner's actual argument on this issue, however, is based primarily on state law. More specifically, Petitioner argued: (1) *Mott* is distinguishable from the instant case because it "was not dealing with the current formulation of Arizona's insanity statute"; (2) the Arizona legislature "unconstitutionally eliminated consideration of whether due to a mental disease a person is insane because they cannot formulate a specific required intent when it eliminated the first prong of the *M'Naghten* test"; and (3) *Mott* is distinguishable because insanity was not raised as a defense in that case. (*Id.* at 8–9.) These arguments do not raise the federal issue contained in the second question in Petitioner's petition because, to the extent that Petitioner attempted to raise a federal issue, he did so at too high a level of generality.

Petitioner *hinted* at a due process violation when he argued that *Mott* incorrectly applied federal law. (*Id.* at 9, citing *Montana v. Egelhoff*, 518 U.S. 37 (1996).)[5] *Egelhoff* sets forth the appropriate standard for determining the existence of a due process violation, *i.e.*, does the state's practice "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 43 (*citing Patterson*, 432 U.S. at 201–02). Petitioner, however, made no argument suggesting that he has a fundamental right to introduce evidence of a mental defect or disease to negate his intent. Although he claims that this evidence has been allowed in the past, the state-court decision he cites does not suggest that allowing evidence of insanity to the intent issue is *required* under the federal constitution. (*Id.* at 9, citing *State v. Korell*, 213 Mont.

5 Petitioner also cited *United States v. Fischer*, 328 U.S. 463 (1946). He did not, of course, contend that this case supported his position. *See id.* at 476 (trial court did not error in refusing to instruct jurors that they could consider the defendant's mental deficiencies in determining whether he acted in premeditation and with deliberation).

316, 329, 690 P.2d 992, 999 (Mont. 1984).) Likewise, the cases Petitioner cites from this Court do not concern the right to introduce evidence of insanity to negate *mens rea*. *See, e.g., Morissette v. United States*, 342 U.S. 246, 263 (1952) (holding that criminal intent is an essential element of the crime of knowing conversion of government property).

Finally, Petitioner cited to several state court decisions upholding the elimination of an insanity defense where a defendant is allowed to introduce evidence of a mental disease or defect to negate an element of an offense. *See, e.g., Bethel*, 275 Kan. at 473, 66 P.3d at 851 (agreeing with Montana, Idaho, and Utah, that "the affirmative insanity defense is a creature of the 19th century and is not so ingrained in our legal system to constitute a fundamental principle of law"). These cases were simply not focused on whether due process *required* evidence of insanity to be admissible to negate *mens rea*. A federal claim is not properly presented where a litigant does nothing more than make passing references to the due process clause. *Adams*, 520 U.S. at 89 n.3 (finding due process claim not properly presented by "passing invocations of due process"); *Webb v. Webb*, 451 U.S. 493, 496–97 (1981) (even though state constitution did not have a full faith and credit provision, the use of the phrase "full faith and credit" did not properly present a federal claim). Thus, despite hinting that his claim was based on due process, Petitioner actually failed to make an argument that a defendant has the due process right to introduce evidence of insanity to negate the *mens rea* element of the crime.

Moreover, although Petitioner's post-verdict motion states that the trial court refused to consider evidence on this issue, the court stated that it was allowing Petitioner to "get all that stuff in," and, in fact, encouraged Petitioner to make an offer of proof as to how it was relevant to the issue of *mens rea*. (Resp. App. C., at 5–6.) Thus, as noted above, although the trial court expressed a preliminary opinion *Mott* controlled this issue, it did not refuse to consider any evidence. Rather,

Petitioner failed to properly present his *request* that evidence of his mental defect be considered in relation to the intent element of the crime. Also, Petitioner cited no evidence in his motion to vacate that would have prevented him knowing that: (1) he was shooting a gun; (2) shooting a gun can cause death; and (3) his victim was a police officer. (See Resp. App. F [trial court concluding that Petitioner "was aware that Officer Moritz was a police officer"].) Accordingly, in addition to failing to provide the trial court a *legal* basis for a federal claim, Petitioner's motion to vacate judgment also failed to provide a *factual* basis for such a claim. *See Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory*, 325 U.S. 450, 463 (1945) (declining to determine constitutionality of state law where there was "an inadequate factual basis for determining whether" the law applied to the litigants).

Further, Petitioner did not properly present this claim to the Arizona Court of Appeals. Although Petitioner made a passing reference to "due process," he did not invoke the due process clause of the Fourteenth Amendment to the United States Constitution in making his arguments. (Resp. App. H, at 46–51.) Indeed, the following subheadings to Petitioner's argument indicate that his claims are based on state law: (1) "The trial court's decision was contrary to Arizona law," (2) "*State v. Mott* does not apply to an insanity defense," and (3) "*State v. Mott* should be overruled." (*Id.* at 47–49.) The arguments themselves also fail to sufficiently state a federal claim. Under the first subheading, Petitioner cites one federal case, which holds, consistent with *Mott*, that there is no federal due process right to introduce evidence of insanity on the issue of *mens rea*. *Wong v. Money*, 142 F.3d 313, 323–25 (6th Cir. 1998). This case, therefore, does not raise Petitioner's claim—it refutes it. Petitioner's second argument on this issue cites no federal law at all. In his third argument, Petitioner posits that *Mott* misapplied federal law. (*Id.* at 49–52.) Petitioner, however, failed to make an affirmative argument that, under the federal constitution, a defendant has a due

process right to present evidence of insanity to rebut the *mens rea* for a crime—he merely claimed that such evidence has been allowed in the past and that many other jurisdictions still allow such evidence. (*Id.*) At bottom, therefore, Petitioner's argument was not one of constitutional dimension, but a plea to the Arizona courts to change state law.

Accordingly, for all these reasons, Petitioner failed to properly present his claims to the state court.

3. *Petitioner's failure to properly present his claim prevented the state courts from making a reasoned decision on this issue.*

There are several reasons for requiring a claim presented to this Court to have either been addressed by, or properly presented to, the state courts, *i.e.*, the "not pressed or passed upon" rule. *Illinois v. Gates*, 462 U.S. 213, 221–22 (1983). First, "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Id.* (citation and internal quotations omitted). In the instant case, there is no record as to what evidence, if any, Petitioner believes affected his ability to form *mens rea* for the crime. Also, by failing to make an offer of proof, Petitioner prevented the prosecution from contesting any such evidence. And, although the trial court stated its preliminary view that such evidence was not admissible, the record is devoid of any final ruling on this issue because of Petitioner's failure to preserve the record. *See Picard v. Connor*, 404 U.S. 270, 277 (1971) (noting that state court could not be faulted for not *sua sponte* addressing claims not properly made).

Further, given that the evidence at issue here was psychological in nature, a very specific offer of proof was required before an informed decision could be made as to the relevancy of the evidence. *See, e.g., Morgan v. Krenke*, 232 F.3d 562, 568–69 (7th Cir. 2000) (concluding that a due process violation did not exist based on the particular offer of proof of psychological evidence made in state court). Here, in order to demonstrate relevancy, Petitioner was required to make an offer of

proof of specific evidence that would have prevented him from knowingly killing another person or knowing that the person was a police officer. In his petition, Petitioner makes some general assertions that he was psychotic at the time of the killing and had delusions that some people were aliens. (See, e.g., Petition at 24, n.3.) There was no testimony at trial, however, that Petitioner's paranoid delusions rendered him incapable of intending to kill another person by shooting a gun at that person. Nor was there any evidence that Petitioner was unable to recognize his fully-uniformed victim as a police officer. Indeed, despite his paranoia and delusions, Petitioner was able to recognize his parents as his parents, even though he may have also believed at some level that they were "aliens." (Resp. App. D at 29, 42–43, 48, 55, 72–73, 92.) And, in fact, Petitioner's expert agreed that Petitioner never referred to police officers as "aliens." (*Id.* at 75.) At any rate, without a specific offer of proof, it is impossible to determine if Petitioner's mental health evidence was even relevant to his ability to form the necessary *mens rea*.

Moreover, the "not pressed or passed upon rule" acknowledges that state courts should be given an opportunity to consider alleged constitutional violations in the first instance. *Illinois v. Gates*, 462 U.S. 213, 221–22 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (noting that if an issue is properly presented, a state law "may be construed in a way which saves their constitutionality"). Here, if Petitioner had introduced evidence, *and* made an offer of proof, that a mental disease or defect affected his ability to form the *mens rea*, the trial court may have agreed with him that his case is distinguishable from *Mott*. Likewise, the Arizona appellate courts may have found *Mott* distinguishable if squarely presented with a different factual scenario. *See, e.g., Mott*, 187 Ariz. 536, 931 P.2d at 1057 (Zlaket, J., concurring) ("This case strikes me as an extremely poor vehicle for delivering sweeping pronouncements about the admissibility of expert psychological testimony in all criminal cases, yet I fear that is precisely what today's majority has

done."); *see also State v. McKeon*, 201 Ariz. 571, 575, ¶ 20 n.2, 38 P.3d 1236, 1240 (App. 2002) (distinguishing *Mott* and holding that a defendant is not precluded from asserting that "temporary intoxication arising from the non-abusive use of prescription medication to negate the requisite state of mind for a criminal act"). Thus, Petitioner's lack of an offer of proof prevented the Arizona appellate courts from determining whether the rule announced in *Mott* even applied in this case.

Accordingly, because the Arizona Court of Appeals did not pass upon the federal claim Petitioner seeks to raise in this Court, and because Petitioner did not properly present this claim in the Arizona courts, it is respectfully submitted that this Court does not have jurisdiction to review this claim under 28 U.S.C. § 1297(a). Further, even if jurisdiction is found to exist, the above arguments demonstrate that the Court should exercise its discretion to deny review. *See Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) ("[E]ven when jurisdiction exists it should not be exercised unless the case tenders the underlying constitutional issues in clean-cut and concrete form.") (citation and internal quotation omitted).

. . .

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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